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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No. 18-md-02843-VC-JSC

**PLAINTIFFS' ADMINISTRATIVE
MOTION PURSUANT TO CIVIL LOCAL
RULE 3-12 TO CONSIDER WHETHER
CASES SHOULD BE RELATED**

Judge: Hon. Vince Chhabria
Courtroom: 4, 17th Floor

This document relates to:
ALL ACTIONS

MADELINE KISS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

FLO HEALTH, INC., GOOGLE, LLC,
FACEBOOK, INC., APPSFLYER, INC., and
FLURRY, INC.,

Defendants.

ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED

MDL No. 2843
CASE NO. 18-MD-02843-VC

I. INTRODUCTION

Pursuant to Civil Local Rules 3-12 and 7-11, and because they raise substantially similar issues of fact and law, Plaintiffs in *In re: Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-cv-02843 (the “MDL”), move the Court to relate the action *Kiss v. Flo Health, Inc. et. al*, No. 3:21-cv-04333-JD (“Kiss”) to the MDL.

II. STATEMENT OF FACTS

Civil Local Rule 3-12(b) provides that “[w]henever a party knows or learns that an action, filed in or removed to this district is (or the party believes that the action may be) related to an action which is or was pending in this District . . . the party must promptly file in the lowest-numbered case an Administrative Motion to Consider Whether Cases Should be Related.” Because the *Kiss* complaint makes allegations against Facebook paralleled by those asserted in the MDL, and because the *Kiss* complaint asserts claims against Facebook that are asserted in the MDL, Plaintiffs believe the cases should be related.

On June 6, 2018, the Judicial Panel on Multidistrict Litigation transferred 30 actions alleging that Facebook shared its users’ information with third parties in contravention of its agreements with users to this Court. Transfer Order, MDL ECF No. 1. The MDL alleges, *inter alia*, that Facebook entered into business agreements with third party entities through which Facebook unlawfully obtained monetary and other benefits. Since that time, other cases alleging claims against Facebook over the “mishandling of users’ information in its arrangements with third parties” have continued to be related to the MDL. *See* MDL ECF Nos. 155, 161, 311, 320.

On September 21, 2018, the MDL Plaintiffs filed a Consolidated Complaint against Facebook. MDL ECF No. 148. Plaintiffs subsequently filed a First Amended Consolidated Complaint on February 22, 2019, MDL ECF No. 257, and a Second Amended Consolidated Complaint (“MDL Complaint”) on August 4, 2020, MDL ECF No. 491. The MDL Complaint alleges that Facebook unlawfully obtained monetary and other benefits by allowing app developers, whitelisted apps, and business partners to access user’s private information without

consent. The MDL Complaint specifically references Flo Health as one of the app developers through which Facebook obtained monetary and other benefits. MDL ECF No. 491 ¶ 261. The Court has since granted in part and denied in part Facebook's motion to dismiss, MDL ECF No. 298, and recently entered an Order amending the case schedule, MDL ECF No. 706.

On June 7, 2021, the *Kiss* plaintiff filed an action in this district against defendants Flo Health, Inc., Google, LLC, Facebook, Inc., AppsFlyer, Inc., and Flurry, Inc. *Kiss* ECF No. 1. The *Kiss* complaint was filed in the same district as six previously-filed lawsuits against Flo Health regarding substantially the same events, the first-filed of which is *Frasco v. Flo Health, Inc.*, 3:21-cv-00757-JD (N.D. Cal.). *See also* *Wellman v. Flo Health, Inc.*, 3:21-cv-01099-JD (N.D. Cal.); *Pietrzyk v. Flo Health, Inc.*, 3:21-cv-01141-JD (N.D. Cal.); *Chen v. Flo Health, Inc.*, 3:21-cv-01485-JD (N.D. Cal.); *Tesha Gamino v. Flo Health, Inc.*, 3:21-cv-02551-JD (N.D. Cal.); *Ridgway et al v. Flo Health, Inc.*, 4:21-cv-03031-YGR (N.D. Cal.). All of the previously-filed cases have been related to the *Frasco* matter pursuant to Local Rule 3-12.

Unlike any of the other cases filed against Flo Health, the *Kiss* matter also asserts claims against Facebook, alleging it was unjustly enriched as a result of the sensitive information it obtained from app developer Flo Health. In this regard, the *Kiss* complaint makes allegations already made against, and wholly subsumed by, the allegations against Facebook in the MDL litigation. As such, the MDL and *Kiss* matter concern substantially the same transaction or event with respect to Facebook and should be related pursuant to Local Rule 3-12.

In compliance with Local Rule 7-11, Plaintiffs have conferred with counsel for the *Kiss* plaintiff, both by sending an email referring them to the Local Rule and also by conferring with them telephonically. Decl. of Cari Campen Laufenberg in Supp. of MDL Pls.' Admin. Mot. to Consider Whether Cases Should be Related, ¶¶ 3-4. Counsel for the *Kiss* plaintiff have indicated that they will oppose this motion. *Id.* ¶ 4. Plaintiffs have also conferred with Facebook's MDL counsel and contacted Facebook's counsel in the *Kiss* matter.¹ *Id.* ¶ 5. Facebook's MDL counsel

¹ Facebook is represented by counsel from the same law firm in the MDL and *Kiss* actions.

has indicated that it does not believe the *Kiss* matter should be related to the MDL, and Facebook's counsel in the *Kiss* matter has not responded. *Id.* at ¶ 6.

III. ARGUMENT

Because the MDL and *Kiss* actions concern “substantially the same parties, . . . transaction [and] event,” and because “it appears likely there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges,” *Kiss* should be related to the MDL. Civil L.R. 3-12(a).

The MDL Complaint alleges that Facebook unlawfully obtained monetary and other benefits by allowing app developers, whitelisted apps, and business partners to access user’s private information without consent—including by targeting users with advertisements. *See* MDL ECF No. 491. The MDL Complaint specifically references Flo Health as one of the app developers through which Facebook unlawfully obtained monetary and other benefits, stating that “Flo Health Inc.’s Flo Period & Ovulation Tracker, which claims 25 million active users, told Facebook when a user was having her period or informed the App of an intention to get pregnant,” and Facebook used this sensitive information “to target users with Facebook ads.” MDL ECF No. 491 ¶¶ 261-62.

The *Kiss* action likewise alleges that “Facebook received, stored, and analyzed users’ intimate health data” that it received “through its agreement with Flo Health,” and “[t]his data was then used for research and development purposes at Facebook, including providing personalized content and advertisements.” *Kiss* ECF No. 1 ¶ 147. As a result of this conduct, the *Kiss* plaintiff alleges that Facebook obtained data with which it “target[ed] Plaintiff and Class members for advertisements and marketing campaigns to boost their own revenue.” *Id.* ¶ 100; *see also id.* ¶ 115. These allegations parallel those already made against Facebook in the MDL. *See* MDL ECF No. 491.

Moreover, as set forth in the table below, the *Kiss* plaintiff’s claims against Facebook also overlap almost entirely with those in the MDL.

	MDL Complaint	Kiss Complaint
Unjust Enrichment	Claim XII	Fifth Claim
Violation of the California Unfair Competition Law	Claim VIII	Eleventh Claim; Twelfth Claim (aiding and abetting)
Invasion of Privacy – Intrusion into Private Affairs	Claim IV	Thirteenth Claim (aiding and abetting)
Violation of the Wiretap Act	<i>See</i> Claim I ²	Fourteenth Claim
Violation of the California Invasion of Privacy Act	Claim XXIX	Fifteenth Claim
Violation of California’s Computer Data Access and Fraud Act	Claim XXXI	Sixteenth Claim

As such, the *Kiss* complaint’s allegations against Facebook mirror both the facts and claims at issue in the MDL proceeding.

Given the factual and legal similarities between the MDL and the *Kiss* matter, relation is proper here to prevent “unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges.” Civil L.R. 3-12(a)(12).

IV. CONCLUSION

Because the law and facts substantially overlap, the MDL Plaintiffs respectfully ask the Court to relate *Kiss* to the MDL.

Dated: August 11, 2021

Respectfully submitted,

KELLER ROHRBACK L.L.P.

BLEICHMAR FONTI & AULD LLP

By: /s/ Derek W. Loeser
Derek W. Loeser

By: /s/ Lesley E. Weaver
Lesley E. Weaver

² The MDL Complaint asserts a claim for violation of the Stored Communications Act, Section II of the Electronic Communications Protection Act (“ECPA”), which is substantially similar to the *Kiss* plaintiff’s claim for violation of the Wiretap Act, Section III of the ECPA. *See Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1211–12 (N.D. Cal. 2014).

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Derek W. Loeser, attest that concurrence in the filing of this document has been obtained from the other signatory. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of August, 2021, at Seattle, Washington.

/s/ Derek W. Loeser

Derek W. Loeser

CERTIFICATE OF SERVICE

I, Sarah Skaggs, hereby certify that on August 11, 2021, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

In addition, the following were served via email:

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Pursuant to Civil Local Rule 3-12, I further caused to be served true and correct copies of the foregoing to be served via U.S. Mail and email on counsel for the parties in the apparently related action as set forth below:

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I declare under penalty of perjury that the foregoing is true and correct.

/s/ *Sarah Skaggs*
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